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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-903

AALCO WRECKING COMPANY, INC.,
Petitioner,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation; MILLER'S MUTUAL INSURANCE COMPANY, a Corporation; AMERICAN MOTORISTS INSURANCE COMPANY, a Corporation; NORTHWESTERN MUTUAL INSURANCE COMPANY, a Corporation; PENNSYLVANIA NATIONAL MUTUAL INSURANCE COMPANY, a Corporation; THE GENERAL INSURANCE CORPORATION, a Corporation; and COMMERCIAL UNION INSURANCE COMPANY OF AMERICA, a Corporation,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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Respondents' brief in opposition to the Petition for Writ of Certiorari (No. 72-903) misinterprets the question presented to the Court. It is not whether an abuse of discretion in granting a new trial is **immune** from review by the Court of Appeals (Res. Br. p. 2).

I

The rule is that the grant of motion for new trial will not be reviewed and reversed except for a clear abuse of the discretion vested in the trial judge.

The Court of Appeals erroneously reviewed the cause de novo and reversed the grant of a new trial without finding such clear abuse.

The decisions of this Court have not changed that rule. It remains as stated in **Fairmont Glass Works v. Cub Fork Coal Company**, 287 U.S. 474 (Pet. p. 8).

Conflict does exist with respect to the principles of law to be followed when courts of appeal reverse the conditional grant of a new trial by the trial judge. The authorities cited by respondents (Res. Br. p. 6) as allegedly resolving this conflict are not in point. **Lind v. Schenley Industries, Inc.**, 287 F2d 79 (3rd Cir.), cert. denied 364 U.S. 835 (1960); **Berner v. British Commonwealth Pacific Airlines, Ltd.**, 346 F2d 532; and **Duncan v. Duncan**, 377 F2d 49, cert. denied, **Fain v. Duncan**, 389 U.S. 913 (6th Cir.) have no bearing on the case at bar.

The Petition for Writ of Certiorari filed with this Court in **Lind** presented several reasons for the grant thereof, one of which dealt with the reversal by the Third Circuit Court of Appeals of a grant of new trial. The Petition was prepared prior to the amendment of Rule 50 of the Federal Rules of Civil Procedure. It was founded upon the contention that the granting of a new trial by the trial court was an order interlocutory in nature and was therefore not appealable. There existed no question of review of the record de novo in **Lind** (supra). That decision did not impose a new and additional burden upon courts of appeal nor did this Court, by denial of certiorari, touch upon the question presented here.

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In the **Berner** case the trial judge entered an order granting a new trial two years after a jury verdict, and did not specify any reason for the grant thereof. Here the new trial was granted on ten specific grounds.

In the **Duncan** case the Court of Appeals for the Sixth Circuit specifically found that the District Court **clearly** abused its discretion in granting a new trial, and in so doing spelled out in detail where such **clear** abuse had occurred.

II

The decisions of the Eighth Circuit do not allow invasion of the discretion vested in the trial court in the grant of new trial absent more than "abuse of discretion."

Respondents contend that the decisions of the Eighth Circuit condone reversal of the conditional grant of a new trial where the Court of Appeals finds less than "clear" or "patent" abuse of discretion (Resp. Br. p. 7). They cite **Milprint, Inc. v. Donaldson Chocolate Company,** 222 F2d 898, **Greene v. Werven,** 275 F2d 134, and **Century "21" Shows v. Owens,** 400 F2d 603 as authority for that proposition. We disagree.

In **Milprint,** a jury returned a verdict for plaintiff of $2,750.00. The trial court granted plaintiff's Motion to Amend Judgment, or in the Alternative for Partial New Trial, or in the Alternative for New Trial and entered a judgment for $10,179.94. On appeal, it was held that if the District Court had entered an order granting plaintiff a new trial or a partial new trial, it would not have been appealable and could have been reviewed only for an **alleged abuse** of discretion on an appeal from the judgment ultimately entered. There was no review of the record de novo nor were the parameters of abuse of discre-

tion defined. The action of the trial court was reversed for the entry of a judgment in excess of that returned by the jury.

Century "21" Shows held that the question of the excessive size of a verdict is to be considered by the trial judge in a Motion for New Trial, and that a ruling thereon is within his sound discretion. This discretion is not to be disturbed unless its exercise resulted in "plain injustice" or constituted a "monstrous" or "shocking" result.

The **Greene** case likewise imposes the requirement of a finding of more than a mere statement of abuse of discretion upon which to base a reversal of the trial court's action. In that case Mr. Justice Blackmun, writing for the Eighth Circuit, held at page 141:

> "The appellant's claim that the court erred in denying the motion for new trial is of no avail. That motion is directed to the discretion of the trial court and this Court will reverse only where **abuse of that discretion is apparent**" (Emphasis supplied).

There was no finding in the instant cause that the action of the trial court constituted "clear abuse" or that it exceeded the bounds of proper discretion as spelled out in **Altricher v. Shell Oil**, 263 F2d 377 (8th Cir. 1959).

CONCLUSION

The fact remains that the decision entered by the Panel imposes new principles. It imprints upon the Court of Appeals the function of the trial court. This radically different concept so destroys settled principles as to require review by this Court. For the reasons stated in the Peti-

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tion and in this Reply, petitioner prays for review by this Court.

Respectfully submitted

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Certificate of Service

I hereby certify that on the 26th day of January, 1973, three (3) copies of Petitioner's Reply Brief were delivered to Hullverson, Richardson and Hullverson, 722 Chestnut Street, St. Louis, Missouri 63101 and to Adolph K. Schwartz, Suite 800 Locust Building, St. Louis, Missouri 63101 and were mailed airmail, postage prepaid, to Dale I. Larson, c/o Robins, Davis & Lyons, 33 South 5th Street, Minneapolis, Minnesota 55402. I further certify that all parties required to be served have been served.

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